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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 697.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Petitioner,

vs.

NADINE PAYNE,
Administratrix of the Estate of Ralph T. Payne, deceased,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION.

CRAIG SPANGENBERG,
1500 National City Bank Building,
Cleveland 14, Ohio,
Counsel for Respondent.

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INTRODUCTION.

Respondent accepts, in the form presented by Petitioner, the Opinions Below, Jurisdiction, Questions Presented for Review, Statutes Involved, and Statement of the Case.

SUMMARY OF ARGUMENT.

A railroad owes the duty to its operating employees to furnish a track reasonably safe for the movement of cars. The duty to furnish a safe track is non-delegable. The railroad may contract to have a third party do the work of maintaining the safety of the track, but it will remain responsible to its own employee if the delegated work is so carelessly done that it causes derailment and injury to the employee. The common law liability for breach of a non-delegable duty remains within the purview of the Federal Employers' Liability Act.

ARGUMENT.

A. THE ISSUE OF IMPUTED NEGLIGENCE (QUESTION NO. 1).

1. Policy Considerations.

This is a case where a railroad brakeman was crushed to death when the car he was riding derailed on a dirty, fouled track. There is no substantial dispute as to the facts. The crux of the legal dispute is whether the common law liability for the breach of a non-delegable duty is included within the purview of the Federal Employers' Liability Act. The trial judge and two judges of the Court of Appeals held that the common law liability remains. One judge of the Court of Appeals dissented, saying that imputed negligence cannot constitute the employer's negligence under F. E. L. A.

Ralph Payne, the decedent, was a member of the switching crew of the defendant railroad, working the night trick on a run which picked up empty cars and spotted loaded cars on various industry side tracks at Huntington, West Virginia. One of the work orders on the night of his death was to enter the plant of Standard Ultramarine and Color Company, commonly called SUCO. As he rode the leading end of an unlighted car into the darkness between two plant buildings the car wheels ran upon three or four inches of dark cinder lying over the rails on a curving track. The ashes lifted the wheels off the track and derailed the car, which rammed through the wall of a plant building, crushing Payne.

No railroad employee had been assigned any duty to inspect this track for obstruction. The track inspector who checked the rails and ties once a month said that he inspected the track only for proper gauge and solid fastenings. The possibility of spilled ash would not, he said, be

his responsibility (R. 138a). The conductor of the crew said that he expected to find a clean track and gave his crew men no inspection duty before sending in the train (R. 190a). He did not expect the lead brakeman, Payne, to see a cinder-fouled condition of the track in the darkness (R. 191a). In a very real sense Payne staked his life on the assumption that the track would be clean enough to hold a car, but no railroad employee had any assigned duty to see that the rails were kept clean nor to inspect them for safety before the nightly switching movements.

The work of keeping the track clear was work that was done by SUCO employees under the agreement between SUCO and the Railroad. Under this agreement the Railroad could use the track for its purposes without charge. SUCO could not authorize any other party to use the track without the Railroad's permission. SUCO, under the agreement, undertook to maintain the track inside its property line (Contract, Plaintiff's Exhibit 23, R. 120a-122a).

It is the Petitioner Railroad's position here that it would be liable "if, and only if, having reasonable cause to anticipate that SUCO would fail to discharge its obligation to keep the track in safe operating condition, it thereafter itself failed to exercise reasonable care to discover and correct any dangerous track condition created through the negligence of SUCO." This is the language of defendant's special charge, set forth in Petitioner's brief as Appendix D. If this were the law, then a railroad would have no duty to furnish a safe track to its operating employees except while running on its own right-of-way. On all movements of trains while switching and spotting cars on industrial sidings, and while running over the tracks of other railroads, the employer railroad could delegate away its obligation to furnish a track system adequate to hold

its cars. It would not be liable for a derailment caused by a defective, fouled or broken track unless it had actual or constructive notice of the unsafe condition. It would clearly be to the railroad employer's interest to avoid the opportunity for notice by avoiding inspection, as it did here, contracting away all maintenance responsibility to the third party.

The employee who is required to ride upon the unsafe track has no knowledge of the terms of track leasing and track maintenance agreements made by his employer. Even if he knew the terms of the agreement, he could not change them, nor demand inspection, nor could he as a practical matter undertake to perform continual track inspection by himself. He looks to his employer to furnish a safe track. He has a right to expect a safe track. His very life depends on it.

It is no answer to the problem to say, as does Petitioner, that he can look to the third party to recover for the negligent maintenance of the track. If the employee is killed in West Virginia, as was plaintiff's decedent here, he would be bound by the arbitrary and archaic limit of $20,000.00 for wrongful death under West Virginia statute, and would have to face the common law defenses of assumption of risk and contributory negligence abolished by the F. E. L. A. His work would be the same, regardless who owned the track, but his rights would be far different.

On policy considerations the trial court and the majority of the appellate court were right in saying: "The employee need not look elsewhere for his protection. He has a right under F. E. L. A. to rely on his employer and none other. When the employer delegates its duty, or abdicates its control, the employer takes the risk, not the employee."

2. The Decision Below Is Not in Conflict With a Decision of This Court.

It is argued by the Petitioner that the decision in the instant case is in direct conflict with *Ward v. Atlantic Coast Line R. Co.*, 360 U. S. 396, and is outside the scope of *Sinkler v. Missouri Pac. R. Co.*, 356 U. S. 326. It is the Respondent's position that this case is parallel neither to *Ward* nor to *Sinkler*, but is controlled by the doctrine of earlier cases cited with approval in *Sinkler*. In the *Sinkler* opinion this Court noted the common law doctrine that the duty to furnish a safe place in which to carry on the operational activities of the railroad crew is non-delegable, citing *Floody v. Great Northern R. Co.*, 102 Minn. 81, 112 N. W. 875, and *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. W. 796, in the body of the opinion; and citing, among others, *Wabash, St L. & P. R. Co. v. Peyton*, 106 Ill. 534, 48 A. 288; *Gulf, C. & S. F. R. Co. v. Shearer*, 1 Tex. Civ. App. 343, 21 S. W. 133; and *Fort Worth & D. C. R. Co. v. Smith*, 39 Tex. Civ. App. 92, 87 S. W. 371 in footnote 3 (356 U. S. at 328).

Each of these cases involved a railroad employee who was injured by reason of a defective track or a fouled and obstructed track owned or controlled or maintained by a third party. In each case the dangerous track condition arose from the negligence of the third party. In each case the negligence of the third party or independent contractor was imputed to the railroad employer on the familiar common law principle that the duty to furnish a suitable track is non-delegable. The opinion in *Story v. Concord & Montreal R. Co.*, 70 N. H. 364, 48 A. 288, states the rule in this language:

> "Under whatever names they were styled in their agreement * * * the undisputed fact of the rightful use of the Boston & Maine tracks cared for and re-

> paired by the Boston & Maine" [the third party] "established that the Boston & Maine were the agency employed by the defendants in the performance of their duty of furnishing a safe and suitable track for their employees. Having either by express agreement or by permissive use of the Boston & Maine track employed that corporation as their agent in the performance of their master's duty, the defendants thereby became responsible for the acts and chargeable with the negligence of such agent; * * *."

The instant case is exactly comparable. The injured man was an operating employee of the railroad, engaged in the work that is the very essence of railroad activity—moving a freight car over a freight track. The duty to furnish a safe track for this employee was non-delegable at the common law. This does not mean the maintenance and inspection work could not be contracted out. The physical performance of the work could be done by others, but the responsibility for careful performance could not be delegated away. The third party who carelessly did the actual work of track maintenance was, as to the railroad employee, an agent of the railroad.

The words "as to" constitute the key phrase. The third party is the railroad's agent *as to* the railroad employee; although an independent contractor *as to* the railroad employer. Under this doctrine the third party never becomes an *employee* of the railroad, but only an agency for whose negligence the railroad is vicariously liable as to the railroad's own employee.

The *Ward* case is easily distinguished on this basis. In *Ward* the railroad had agreed with the industry that the industry would maintain the private sidetrack. The industry hired the plaintiff in that case to do repair work. On the day he was injured he was not an employee of the railroad, but had hired out independently to the industry

as its employee. The F. E. L. A. gives an *employee* of the railroad the right to recover for negligence of an *agent* of the railroad; but it does not by its terms nor by any interpretation of its terms give an *agent* of the railroad the right to cover for the negligence of another agent.

In *Ward* it was claimed that the industry employee must be deemed to be an *employee* of the railroad while doing the maintenance work; and this claim was properly denied. The analogy to the instant case would be to argue that the SUCO employees who sometimes shoveled out the clogged rails were railroad employees while shoveling, and could recover for each other's negligence when so engaged. No such claim has been made nor suggested. The SUCO employees remained SUCO employees, in the service of the industry. At the same time they were the agency adopted by the railroad to discharge its duty of furnishing a safe track, and as to Ralph Payne they were agents of his employer.

Let us suppose that in the *Ward* case the industry employees had so carelessly repaired the track that it was unsafe, and when the railroad crew next came into the siding the train derailed and killed a brakeman. Could the railroad then say it has discharged its duty to its own employee by delegating away to the industry the responsibility for furnishing an adequate track? It could not at common law, and it has never been suggested before the dissenting opinion was written below that F. E. L. A. *diminished* the employee's rights under common law concepts of negligence and imputed negligence.

The instant case is much closer to *Sinkler* than to *Ward*. In *Sinkler* a railroad employee was injured by the negligence of a third party crew who were switching the railroad's car. This Court there held that the term "agent" must be given an accommodating scope so that all

those who perform the operational activity of moving cars for the railroad are agents of the railroad whose cars are moved. In the same pattern it should be said that those who furnish the track over which the cars must be moved by the railroad employees are agents of the railroad, as to the operating crew, in performing the railroad's duty of furnishing to its employees a reasonably safe rail and roadbed. This is not new doctrine, but old doctrine, and no accommodating scope is required to bring this meaning of agency within the purview of F. E. L. A.

Under the Act, the railroad is liable for defects, due to its negligence, in its track and roadbed. The term "its track" must mean the track over which it runs its cars, regardless where record legal title to the track lies. The term "its negligence" includes the negligence of others, imputed to it by reason of the non-delegable quality of its duty to keep its track safe for car movements.

3. Decisions of Other Courts of Appeals.

Respondent has cited, as conflicting decisions, *Kaminski v. Chicago River and Indiana Ry. Co.*, 200 F. 2d 1 (C. A. 7, 1952); and *Wetherbee v. Elgin, Joliet and Eastern Ry. Co.*, 191 F. 2d 302 (C. A. 7, 1952), subsequent appeal 204 F. 2d 755, cert. den. 346 U. S. 867.

The *Kaminski* case involved a non-operating employee, a car checker, walking along a privately maintained path of the industry when he was injured. It is not in point. The *Wetherbee* case involved derailment caused by a plank on the track, but it is by no means clear the plank was on the track because of negligence of the industry. Respondent here recognizes that negligence is still required, even though it may be imputed negligence which imposes the liability.

The result in *Wetherbee* is inconsistent with Respondent's position here to the extent that the opinion required notice of the unsafe track to be brought home to the railroad. However, the decision cannot fairly be construed as denying the validity of Respondent's position in the instant case. The *Wetherbee* opinion nowhere touches upon the common law concept of non-delegable duty. Either counsel in that case did not know the theory of vicarious liability, or thought that other approaches to liability were stronger, or believed he could not prove the industry-agent's negligence caused the defective track condition. If counsel for the plaintiff in that case did not approach it as a non-delegable duty case, and did not aid the court by briefing or arguing that point, then the adverse decision is not persuasive. In any event both *Wetherbee* and *Kaminski* were decided some years before *Sinkler*, which restated the common law concept of non-delegability.

The defendant in the instant case itself advanced that concept successfully for its own benefit in the case of *Baltimore & Ohio R. Co. v. Alpha Portland Cement Co.*, 218 F. 2d 207 (C. A. 3d, 1955). The Railroad was switching cars over a switch track owned and maintained by the Cement Company under a contract with the Railroad. The Cement Company had a private crossing over the siding which had no planking, but only dirt fill, which had become muddy. Trucks of the Cement Company had slopped the mud up over the rails, where it became frozen.

The Railroad's switch crew shoved a cut of cars over this crossing when it was fouled by the frozen mud and ice. The leading car derailed, and a brakeman riding the leading car was crushed between the car and an adjacent building. The condition of the crossing was concealed by a light snow at the time. The Railroad had inspected the

track two days before, and at that time found nothing wrong. Its first knowledge of the dangerous condition came with the derailment.

The Railroad settled the claim of the injured brakeman, and brought action for indemnity against the Cement Company. Obviously it would not be entitled to indemnity unless it had been liable for the injuries to the brakeman. The trial Court found that the injuries were caused by the negligence of the industry in creating the unsafe condition at the crossing and in failing to remedy it as required by the side track agreement. The trial Court found specifically that the place became unsafe without fault of the Railroad and by sole fault of the Cement Company, but that the condition breached the non-delegable duty of the Railroad to furnish a safe place to work. Full indemnity was given to the railroad.

On appeal the Court of Appeals for the Third Circuit affirmed, saying, at 211:

> "We are thus presented with a case in which the defendant (the Cement Co.) was actively negligent in creating and not correcting the unsafe condition of the track which caused the accident while the plaintiff's (B. & O. R. Co's.) only negligence consisted of the defendant's negligence *vicariously imputed to it by virtue of its non-delegable duty* to its employee, Miller, to provide him with a safe place to work."

The force of this case was not diminished by *Shenker v. Baltimore & Ohio R. Co.*, 303 F. 2d 596 (C. A. 3d 1962), certiorari granted November 19, 1962. There a B. & O. employee was injured while performing services for the P. & L. E. and the majority opinion in the Court of Appeals treated the question as though the P. & L. E. had employed the B. & O. to do P. & L. E. work so that the employee would be in effect a loaned servant to the P. & L. E.

The non-delegable duty would then be imposed upon the P. & L. E. The dissent in that case viewed the B. & O. employee as doing B. & O. work on P. & L. E. premises, and accordingly entitled to the benefit of the non-delegable duty rule. In the instant case there is no question that Payne was a B. & O. operating employee on a B. & O. train doing B. & O. work, and the complicating problems of the *Shenker* case are not involved.

There is no true conflict in the decisions below which require resolution by this Court.

4. The Statutes Requiring Switch Track Connections.

Petitioner has cited, and printed in its Appendix C, the text of 49 U. S. C. Sec. 1 (9) and West Virginia Code, 1955, Sec. 2563, which require a common carrier under certain conditions to furnish a switch connection with private side tracks; and argues that the carrier's responsibilities are fully discharged when it has provided such switch connection. The statutes are irrelevant. The carrier's duties as to the industry may be fully discharged when it builds the switch, but its duty to its own employee to furnish a reasonably safe track follows the employee wherever his work orders take him. The Railroad here was not required to run its cars over the length of the private tracks. Its legal duty as a carrier would be discharged when it delivered the cars onto the siding past the switch, leaving further movement and precise spotting at plant doors to the industry. If the Railroad elects to perform the further service of pick-up, spotting and switching work, it acts on business judgment and not under legal compulsion. It can fully protect itself, under these circumstances, by requiring the industry to furnish a suitable indemnity agreement. *Luton Mining Co. v. Louisville & N. R. Co.*, 276 Ky. 321, 123 S. W. 2d 1055. It is well estab-

lished that under such an indemnity contract the Railroad may obtain full indemnity for any loss where the Industry's negligence imposes liability upon the Railroad for injury to an employee on the private side track. *Booth-Kelly Lumber Co. v. Southern Pacific Co.*, 188 F. 2d 902.

Should the writ of certiorari be granted in the instant case to restate these propositions? There is no necessity for it. We suggest that the ruling of the trial court was correct. The decision of the Court of Appeals was right. The opinion of that court is concise, well-reasoned, and well-written. It properly applies the teaching of the *Sinkler* case, recently decided by this Court and will serve as a proper guide to other trial courts which may face a similar problem. There is no reason to grant certiorari under these circumstances, and the petition should be denied.

B. IS THE TRIAL COURT COMPELLED TO CHARGE ON THE TAX CONSEQUENCES OF A VERDICT? (QUESTION 2.)

It is true that the award to the plaintiff, when collected, will not be subject to income tax. It is also true that it will be deductible as a business expense by the defendant. It is probably true that the gross award will be reduced by trial and appellate costs and attorney fees. It might be illuminating to tell the jury all these truths, but none of them are directly related to any issue in the case.

There is no reason to believe that the jury thought the verdict would be taxable, or attempted to increase it to the extent of assumed taxes in violation of the Court's instructions on damages. It may well be that if a jury is in doubt and questions the Court that the jury should then receive instruction. Where no inquiry is made there seems no

reason to assume the jury manipulated the verdict on an improper consideration of tax consequences.

An instruction on tax consequences is within the discretion of the trial Judge. No federal case has held it is error to give such instruction. No federal case has held it is error to refuse such instruction. It may be that this Court will feel free to give an advisory opinion on the subject for future cases, but this can be done in any injury case in which certiorari is granted on other grounds. There is no need to review this case for that limited point.

CONCLUSION.

The petition for writ of certiorari should, for the foregoing reasons, be denied.

Respectfully submitted,

CRAIG SPANGENBERG,
Counsel for Respondent.